IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 255

GERHART EISLER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* FOR LEAVE TO ARGUE THEREON, AND BRIEF *AMICI CURIAE* ON BEHALF OF EDWARD K. BARSKY, *ET AL.*

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PETITION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND FOR LEAVE TO ARGUE THEREON

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that they be granted leave to file a brief *amici curiae* and to argue thereon in the instant case.

All of the petitioners except the petitioner Helen R. Bryan are members of the Executive Board of the Joint Anti-Fascist Refugee Committee, an unincorporated association with offices at 192 Lexington Avenue, New York City.

The petitioner Helen R. Bryan is Executive Secretary of the Joint Anti-Fascist Refugee Committee.

All the petitioners except the petitioners Ernestina Fleischman and Helen R. Bryan have been convicted of a violation of Section 192, Title 2 of the United States Code involving a contempt of the House Committee on Un-American Activities, and after affirmance of conviction by the Court of Appeals for the District of Columbia certio-

rari was denied by the Supreme Court of the United States on June 14, 1948. On June 22, 1948, a petition for rehearing was filed with this Honorable Court on which decision is still pending.

The petitioners Bryan and Fleischman were also convicted of a violation of 2 U. S. C. 192, involving a contempt of the aforementioned House Committee. Argument in their cases has been held before the United States Court of Appeals for the District of Columbia, and decision is pending. One of the issues involved in the instant case, as in the case of each of the petitioners herein, is that of the constitutionality of the House Committee on Un-American Activities. The decision in the instant case will, therefore, vitally affect the cases of each and all the petitioners. The importance of the issues involved has led the petitioners to request that in addition to being given permission to file the accompanying brief *amici curiae*, counsel for petitioners be permitted to argue upon the said brief at the time of oral argument in the instant case.

Permission has been given by counsel for the petitioner Eisler and for the Government to submit this brief and to ask for leave to argue thereon.

Respectfully submitted,

EDWARD K. BARSKY, JACOB AUSLANDER, LYMAN R. BRADLEY, HOWARD FAST, HARRY M. JUSTIZ, RUTH LEIDER, JAMES LUSTIG, MANUEL MAGANA, LOUIS MILLER, CHARLOTTE STERN, ERNESTINA FLEISCHMAN, HELEN R. BRYAN,

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UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF EDWARD K. BARSKY, *ET AL.*, AS *AMICI CURIAE*

The facts in the instant case are fully set forth in the petition for certiorari of the petitioner Eisler and need not be repeated here. This brief addresses itself to the question of the unconstitutionality of the House Committee on Un-American Activities (hereinafter sometimes called "The House Committee" or "the Committee"), which is one of the points argued by the petitioner Eisler in his brief. This point is also at issue in the cases of each of the petitioners as mentioned in the petition attached hereto.

More specifically, this brief will concern itself with the particular question of whether the statute creating the House Committee on Un-American Activities (hereinafter called "the Resolution") (Sec. 121(b), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828, amending Rule XI(1)(q)(2) of the Rules

of the House of Representatives),* was unconstitutional in that the resolution violates the Fifth and Sixth, the First, the Ninth and Tenth Amendments to the United States Constitution.

A

The Resolution violates the Fifth and Sixth Amendments to the United States Constitution.

The language of the Resolution sets up the following "matter under inquiry":

(1) "propaganda activities" which are
  (a) "un-American";

(2) "Propaganda" which is
  (a) "subversive and un-American"
  (b) "and attacks the principle of the form of government as guaranteed by our Constitution."

The defect of this language is not so much that it sets up vague, general, equivocal and impractical standards, but rather that it sets up no recognizable standard. This conclusion will appear from the demonstration that the key terms used are unknown to the law and have acquired no specialized or technical meaning and have acquired no meaning "by general acceptation", a standard suggested by Cardozo, *J.*, in *Schecter Poultry Corp. v. United States*, 295 U. S. 495, 552 (1935). Indeed, as late as 1946, eight years after the House Committee was established, the Chief Counsel of the House Committee wrote to a member of Congress, under date of July 18, 1946, as follows:

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* The House Committee was previously established under successive Resolutions of the House of Representatives: House Resolution 5, 79-1, 91 C. R. 10, 15 (1945); H. R. 282, 75-3, 83 C. R. 7568, 7586 (1938); H. R. 26, 76-1, 84 C. R. 1098, 1128 (1939); H. R. 321, 76-3, 86 C. R. 572, 605 (1940); H. R. 99, 77-1, 87 C. R. 886, 899 (1941); H. R. 420, 77-2, 88 C. R. 2282, 2297 (1942); H. R. 65, 78-1, 89 C. R. 795, 810 (1943).

> "The committee has adopted no definition of subversive or un American activities". (78-2 Daily C. R. A. 5013, 1 August, 1946).

The key term employed — "un American" — is commonly considered as an epithet, not a term of clear meaning. The President's Advisory Committee on Universal Training, confronted with the contention that universal military training is "un American", stated:

> "An epithet is not an argument. Un American means simply that it has not been done before in America. If Americans want it, it becomes American."
>
> ("A Program For National Security", Report of the President's Advisory Committee on Universal Training (1947) 39).

The latitude which the House Committee enjoyed in the definition and application of the terms of the Resolution compelled a member of the Committee, Rep. Voorhis, to point out in a minority report:

> "All the minority is contending for is the right of loyal American citizens to disagree politically with a majority of the Dies Committee without being branded as subversive and un American" (77-2 H. Rep. 2277, p. 7, 25 June 1942).

These observations as to the lack of meaning of the terms in the Resolution are confirmed by a thorough and complete analysis in a Columbia Law Review Note for April, 1947 (Note 47, Columbia Law Review, 419-423). The author of the Note reached the conclusion that the Resolution is vague and indefinite in scope only after exploring every possible source of definition. Thus, unable to find a dictionary definition of the determinative terms of the Resolution, the author of the Note examines the various other statutes employing those terms and concludes that the words "un-

American" and "subversive" have "unsettled meanings." (47 Columbia Law Rev., 421), and that the Supreme Court was unable to define the "principle" of our "form of government" so as to give meaning to the expression "propaganda . . . (which) attacks the principle of the form of government as guaranteed by our Constitution" (*Schneiderman v. United States*, 320 U. S. 118, 143). And an inquiry into previous investigations of a similar nature revealed that they were framed in narrower terms than the Resolution and the inquiries conducted were much more limited than that of the House Committee (47 Columbia Law Rev., 421). Moreover, the Congressional debates "provide no satisfactory indication of the scope of its (the House Committee) power", instead they reveal "that the House had no clear intent as to the subject matter to be investigated"—indeed, the Committee was purposefully accorded "a roving commission to inquire into any propaganda activities which a majority of the Committee thought warranted investigation" (47 Columbia Law Rev., 421-422).

The most graphic picture of the unlimited scope of investigation which the House Committee deems itself authorized to make is found in the welter of contradictory statements which it has made from time to time in its reports.

Its 1939 Report suggests that the following are un-American: "absolute social and racial equality"; "the destruction of private property and the abolition of inheritance," apparently irrespective of the means employed or advocated; and "the substitution of communal ownership of property for private ownership"; "the duty of government to support the people"; "bureaucratic and paternalistic governments"; "a system of planned economy"; "collectivism"; "collectivistic philosophy; the promise of economic security"; "political, economic, or social regimentation"; and "the destruction of the American system of checks and balances with its three inde-

pendent coordinate branches of government" (76-1, H. Rept. 2, Jan. 3, 1939, at p. 12).

In its wartime Report of 1942, the distinction drawn in the above Report seems to have been ignored. The Report attacked an organization, not on the ground that it was foreign controlled, or enemy controlled, but because its propaganda, critical of members of Congress, was designed to bring Congress itself into disrepute, and also because of the "company" the organization had attracted (77-2 H. Rept. 2277, 25 June, 1942). The minority report of Mr. Voorhis comments:

> "Once, however, the committee undertakes to accuse people of un-American activities because they criticize certain features of our economy or say unkind things about finance capitalism or because they come out for a greater degree of cooperation in our economic life, it is in danger of becoming an agency which arrogates to itself the right to censor people's ideas. That in itself is un-American."

Its wartime Report of 1943 (77-2 H. Rept. 2748, Jan. 2, 1945) indicates that the following may constitute un-American propaganda activity: "Joining Communist Front groups," apparently irrespective of the activity of the group (*id.*, p. 3); "endeavoring to secure American support for Russia's foreign policy" (*id.*, p. 10); broadcasts by commentators who "have shown that they would like to see another civil war created in one country of Europe in order to re-establish a communistic regime" (*id.*, p. 10); criticism of General MacArthur and of Chiang Kai-Shek (*id.*, p. 10); advocating the "creation of a world state which would embrace Socialism or Communism" (*id.*, p. 10) "calling for the dissolution of the British Empire" (*id.*, p. 10); severe criticism of many individual members of Congress and of Congress as a whole (*id.*, p. 13); propaganda containing "the suggestion that any native-born person who claims to be 100 percent American is either a

Fascist or is likely to become one very shortly" (*id.*, p. 14); the fact that "in a recent book he viciously attacked cartels, making libelous accusations aginst the Standard Oil Company of New Jersey and other responsible industrial organizations which made such extensive contributions to the war effort" (*id.*, p. 35); "The lies and deceits used by the Spanish front organizations and their propaganda to create in the minds of the people of America the impression that the streets of Spain are covered with blood" (*id.*, p. 49). Two-thirds of the Committee's Report is devoted to material relating to Spain, the tenor of which suggests that opposition to General Franco is indicative of un-American activity.

The Congressional debates which failed to ascribe any meaning for "un-American" indicate that the word "subversive" is as undefinable.

After almost five years of investigation and Committee Reports by the previous Committee, a member of the House found it necessary to ask on the floor of the House during the debate on the continuance of the Committee what "subversive" meant:

> "Mr. Outland: Just what are subversive activities?
>
> Who is to be the judge? There have been people who have called the chairman of the Committee subversive, which in my opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed subversive is a dangerous and un-American thing" (78-1 C. R. 806).

No answer to this question is recorded; indeed, as the word is used, none can be given.

A "Special Report on Subversive Activities Aimed at Destroying our Representative Form of Government" by a predecessor Committee, does no more to remove the meaning of "subversive" or "our representative form of

government" from the realm of conjecture. The Report was devoted principally to the "exposure" of an organization which had issued a score card or rating card of the individual members of Congress, which apparently was severely critical of many individual members and of the record of the Congress (77 2 H. Rept. 2277).

As to the Committee's understanding of its powers with respect to the phrase "attacks the principle of the form of government as guaranteed by our Constitution," Representative Wood, when chairman of the Committee, stated at one of its hearings that "the committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds *American (sic)* principles of government." *Hearings on Communist Party*, Committee on Un-American Activities, H. Res. 5, 79th Cong., 1st Sess., Sept. 27, 1945, p. 31 (italics added).

Truly, the Committee lays no restraints whatsoever upon its powers of investigation.

The evidence thus amply sustains the conclusion "that the intent of Congress was to give the Committee absolute discretion in its probe" and "not to restrict the Committee by giving an explicit meaning to the authorizing enactments" (47 Columbia Law Rev., 423). For after searching for meanings which may be properly attributed to the words "un-American," "subversive" and "attacks the principle of the form of government as guaranteed by our Constitution," we may now conclude that, in sober fact the vice of the Resolution here involved is that it sets no standard whatever for determining the scope of the investigation authorized. Whim, opportunism, expedience, prejudice—these are the standards governing the Committee.

These standards are not definable, delimitable or in any way restrictive. Indeed, when on April 8, 1937, a proposed

House resolution which placed the term "un-American" within a limiting context was defeated (H. R. 88, 75-1, C. R. 3048, 3283, 3290), the member in charge of the proposed resolution, in reply to a question as to the meaning of "un-American," stated:

> "The Committee may read this resolution and put whatever interpretation they see fit upon it without any limitation so far as I am concerned" (75-1, C. R. 3285).

This is not a definition by usage or general acceptation; this is *ad hoc*, subjective definition. It is improper thus to accord the House Committee the unlimited power of defining the words, "un-American," and "subversive," the basis upon which men may be compelled to appear, testify, and produce books and records; be subjected to the harassment and notoriety frequently attached to a House Committee hearing; and be publicly exposed and denounced as politically "dangerous."

In the case of *U. S.* v. *Barsky*, 167 F. (2), pages 247-248, 260-261, involving most of the instant petitioners, the Court of Appeals for the District of Columbia, in its opinion indicated that the term "un-American" is, in fact and law, too vague to be valid. Furthermore, this Court in *Winters* v. *New York*, 333 U.S. 507, indicated that it considered "subversive activities" too indefinite as a standard of guilt.**

The majority opinion in the *Barsky* case nevertheless concluded that the Resolution was a valid delegation of Power by the Congress to the House Committee since the instruction therein to the House Committee to investigate propaganda which "attacks the principle of the form of government as guaranteed by our Constitution . . . ," " . . . is definite enough". 167 F. (2), pages 247-248, 260.

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* See Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1, 39, 40 (1949).

** See Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale Law Journal 42-43 ff. (1949).

261. Yet this Court was unable to isolate any "principles of the Constitution" in *Schneiderman v. United States*, 320 U. S. 118 (1943). There, Mr. Justice Murphy stated:

> "Criticism of, and the sincerity of desires to improve the Constitution should not be judged by conformity to prevailing thought because, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.'" 320 U. S. at 138.

As Judge Edgerton stated in the *Barsky* case with respect to the use in the Resolution of this clause:

> "The enabling Act uses the word 'subversive,' the word 'attacks,' and the words 'the principle of the form of government as guaranteed by our Constitution,' but it uses none of them independently of the word un-American. Moreover, the quoted words themselves have no reasonably clear meaning. Does 'the principle of the form of government' here mean the republican or democratic principle only, or does it include e. g. the constitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles * * * are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means by 'the principles,' or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e. g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy. Neither do I know whether the kind of propaganda with which the House Committee undertook to connect the appellants through their records 'attacks the principle.' A member of the Communist Party who advocates sweeping constitutional changes may, in the Supreme Court's view, be 'attached to the principles of the Constitution' within the mean-

ing of those words in a naturalization act." 167 F. 2d at 262.

The "principles" or the principle of our government are, indeed, almost incapable of exact definition. But if there is anything genuinely "un-American" or contrary to the "principles" of our constitution, it can be said with some degree of confidence that it is the vigorous attempt by the "House Committee on Un-American Activities" to enforce a rigid and narrow political orthodoxy on this free land of ours.

Guilt or innocence of the action of witnesses before the House Committee depends upon the meaning of the key terms of the Resolution. For it is necessary to refer to the Resolution in order to determine whether petitioners committed a crime under Section 192, Title 2 of the United States Code. The Resolution provides the standard of guilt under Section 192 and, accordingly, the Resolution must conform with the constitutional requirements of definiteness and certainty which pertain to any penal law. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). Because of the lack of definiteness of the terms of the Resolution, discussed previously, the Resolution entirely fails to meet those requirements and thereby violates the Fifth and Sixth Amendments to the United States Constitution. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *United States* v. *Reese*, 92 U. S. 214 (1875). Nor may this defect in the Resolution be cured by the judicial construction of this Court: *United States* v. *Reese*, 92 U. S. 214 (1875); *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126 (1913); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948).

The Court should therefore declare the Resolution unconstitutional as in violation of the Fifth and Sixth Amendments to the Constitution.

B

The Resolution violates the First Amendment to the Constitution of the United States.

That the investigations into "propaganda activities" authorized by the Resolution and conducted by the House Committee abridges speech, press and assembly, was assumed by the majority and dissenting opinions of the Court of Appeals in the *Barsky* case; nor was it disputed in that case that the First Amendment limits the Congressional investigatory power. *Barsky* v. *U. S.*, *supra*, 167 F. 2d at 246; cf. *Colonial Sugar Refining Co.* v. *Attorney General*, 15 Commonwealth L. R. 182 (1912) *rev'd* L. R. (1914) App. Cas. 237; *Greenfield* v. *Russel*, 292 Ill. 392, 127 N. E. 102 (1920); see *Jones* v. *Opelika*, 316 U. S. 584, 600, 609 (1942). The same principle should be applicable in the instant case of the petitioner Eisler.

Public inquiries into matters of opinion and expression protected by the First Amendment are prohibited by that Amendment.* *United States* v. *Ballard*, 322 U. S. 78 (1944), see *Cummings* v. *Missouri*, 71 U. S. 277, 331 (1867). As stated in the dissent of EDGERTON, *J.*, "No one denies

* Prior to the adoption of the First Amendment, at the trial of Anne Hutchinson in 1637 before the General Court at Newton in the Province of Massachusetts Bay, the following colloquy occurred:

> "*Gover.* Only I would add this. It is well discerned to the court that Mrs. Hutchinson can tell when to speak and when to hold her tongue. Upon the answering of a question which we desire her to tell her thoughts of she desires to be pardoned.
>
> *Mrs. H.* It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that."

(*Abramowitz, The Great Prisoners*, 316 (1946).)

that the inquest is an effective instrument of restraint" *Barsky* v. *U. S., supra*, 167 F. 2d at 260. The House Committee inquiry, motivated by "sheer animosity and excited partisanship" (Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 11 *U. of Chic. Law Rev.* 1, 117, 150 (1944)) and conducted in a manner violative of procedural due process (see *Ogden, The Dies Committee*, c. IV, VIII, IX, XIII, XVII (2 ed. 1945); *Gellerman, Martin Dies*, c. 4, 5 (1944); *Cushman, Safeguarding Our Civil Liberties*, 7-8 (1943); 94 Cong. Rec. 2487, 2490, 2493, 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 395 (1948); 14 *U. of Chic. Law Rev.* 256, 263 (1947); 47 *Columbia Law Rev.* 416, 428 (1947); *N. Y. Times*, Oct. 8, 1947, p. 7, col. 5 (RIFKIND, *J.*); *N. Y. Herald Tribune*, March 14, 1948, p. 22, cols. 6-8 (Archibald MacLeish)), is such "an effective instrument of restraint."

Compulsory public disclosure of constitutionally guaranteed opinion and expression is another aspect of the Committee's activities which is limited by the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The compulsory public disclosure of unorthodox opinions and speech is a patent restraint thereupon. Under the Resolution the Committee not only restrains the unorthodox by compulsory disclosures but restrains more orthodox views or speech by publicly characterizing any individual or organization* distasteful to the House Committee (or its members) as "subversive," "un-American," or "communistic" (H. Report 2277, 77th Cong., 2nd Sess., Minority Report 4, 7 (1942)).

Speech is restrained and impaired if the speaker is subject to Congressional inquiry, to compulsory public disclosure of, and to stigmatization because of his religious, political, economic or social opinions.

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* See, e. g., Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 *Harv. L. Law Rev.* 1193 (1947).

Although the Resolution on its face, and as construed and applied herein, abridges speech, press and assembly, it is not claimed that the expression which is the subject matter of the Resolution nor the expression or activities of the petitioner Eisler, creates a clear and present danger to any substantive public interest. Cf. *Schenck* v. *United States*, 249 U. S. 47 (1919); *Bridges* v. *California*, 314 U. S. 252 (1941); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

It is immaterial that the Resolution does not *in haec verba* provide for "direct and candid efforts to stop speaking or publication as such." *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945). "The House Committee's enabling Act concerns, specifically and exclusively, 'propaganda activities', and the Committee's principal purpose is to restrain them" (EDGERTON, *J.*, *Barsky* v. *U. S.*, 167 F. 2d at 255). The decisions of this Court make no exception for abridgements by investigation.* It is the right impaired and not the limitation which requires that test to be applied. *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

The revenue power (*Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Grosjean* v. *American Press Company*, 296 U. S. 233 (1936)), the police power (*Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), the judicial injunctive and contempt power (*Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941)), the denaturalization power (*Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665

* "To the general observation that an agency having authority to make an investigation may compel disclosure of all information relevant to the investigation, irrespective of the scope of the agency's regulatory power, an exception must be noted to the effect that when the purpose of compelling a disclosure is not to secure information for governmental purposes but is to use the power of compelling the disclosure as a sanction for producing a desired regulatory effect, the agency's action is necessarily limited by the scope of its regulatory power. If the agency may not regulate, it may not regulate by using publicity as a sanction." Davis, "The Administrative Power of Investigation," 56 *Yale Law J.* 1111, 1136 (1947).

(1944)), the deportation power (*Bridges* v. *Wixon*, 326 U. S. 135 (1945)), and even the power to preserve the safety of the Government (*Hartzel* v. *United States*, 322 U. S. 680 (1944); *Stromberg* v. *California*, 283 U. S. 359 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943)), are all limited by the constitutional rule restraining abridgement of any speech, press or assembly. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). The exception carved out by the United States Court of Appeals for the District of Columbia for the investigatory power creates "a blank spot in the protective covering" of the Bill of Rights, which may be used—or rather is in fact being used—to destroy the very rights it guarantees. As Mr. Justice STONE pointed out, wisely has the "First Amendment prohibit(ed) all laws abridging freedom of press and religion, not merely some laws or all except tax laws." *Jones* v. *Opelika*, 316 U. S. 584, 609 (dissent, adopted as majority view in 319 U. S. 103).

The exception cannot be justified on the grounds that the abridgement of constitutional rights is a tangential incident of Congressional investigation. For the regulation of freedoms guaranteed by the First Amendment is the objective, not a by-product, of the Resolution. The Resolution was re-enacted without change annually after 1938 over objections to and criticisms of the House Committee practices by members of the House. (83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-729, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946); 94 Cong. Rec. 2483-2496 (1948)), so that the Committee practices have been incorporated into the Reso-

* *Josephson* v. *United States*, 165 F. (2) 82, 93 (C. C. A. 2, 1947), *cert. den.* 333 U. S. 838 (1948), CLARK, J., dissenting.

lution. *Poe* v. *Seaborn*, 282 U. S. 101 (1930); *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *United States* v. *Cerecedo Hermanos y Co.*, 209 U. S. 337 (1908); *National Lead Co.* v. *United States*, 252 U. S. 140 (1920); *Boehm* v. *Commissioner of Internal Revenue*, 326 U. S. 287 (1945); *Douglas* v. *Commissioner of Internal Revenue*, 322 U. S. 275 (1944); *Merchants National Bank* v. *Commissioner of Internal Revenue*, 320 U. S. 256 (1943). We need not here consider the situation where a Congressional committee incidentally inquires into matters of opinion and expression in the course of an investigation preparatory for legislation, since the history of the House Committee, which has been infused into the Resolution, reveals that the House Committee is investigating "propaganda activities" not as a preface to legislation but for the purpose of fixing and enforcing standards of political, economic and social orthodoxy in violation of the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 323 U. S. 516, 544, 545 (1945). In fact, the Committee need not legislate—it has imposed, and is in the process of imposing its own standards of orthodoxy not by legislation—which, as indicated previously, the Committee fears might be struck down as unconstitutional, but by exposure, censorship, defamation and "smear."

Even the objective of the House Committee investigation as construed by the United States Court of Appeals for the District of Columbia is not constitutionally sufficient to counter-balance "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). The impairment by the House Committee investigation of speech, press and assembly is a greater jeopardy to the security and stability of the nation than the views and expressions investigated. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931); *Near* v. *Minnesota*, 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353,

365 (1937); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943). Any actual, attempted or potential threat to the national security is already the subject matter of adequate police investigation and criminal sanctions. 18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31.

The position of the Circuit Court in the *Barsky* case that the particular inquiry there discussed was authorized cannot be sustained. The Resolution is so vague and indefinite that it authorizes the abridgement of opinion, speech, press and assembly of petitioner and others which are indisputably constitutionally inviolate. A statute which is so vague and indefinite that it extends to speech which may not be impaired as well as speech which may be impaired is a prior restraint on all speech in violation of the First Amendment. *Winters* v. *New York*, 330 U. S. 507 (1948); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Musser* v. *Utah*, 333 U. S. 95 (1948); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Bridges* v. *California*, 314 U. S. 252 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Carlson* v. *California*, 310 U. S. 106 (1940); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). As previously indicated, it is not in this Court's duties or powers judicially to legislate a proper Resolution.

The majority opinion of the United States Court of Appeals for the District of Columbia in the *Barsky* case suggests that the abusive applications of the Resolution by the House Committee may judicially be disregarded as superfluities, restraint of which should be exercised by the Congress. But the abuses and abridgements by the Committee have been integrated by re-enactment into the Resolution and it is a proper function of this Court to provide

relief therefrom. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). It has been stated on the floor of the Congress that "* * * a large number of us are afraid to vote against the Dies Committee. Afraid to vote our honest conviction because we are afraid of the misconceptions and false impressions which that committee, through abundant publicity, has built up in the American public." 89 Cong. Rec. 803 (1943) (Rep. Gale); see also Note, 14 *U. of Chic. Law Rev.* 256, 266 (1947).

As is more fully pointed out in the main brief in this case (pp. 19-35) the Committee has become the well-nigh all powerful censor of the First Amendment. The vague and almost unlimited powers of inquiry it was given inevitably resulted in its assuming the censorship power. In the field of economic thought and ideas, political opinion, in the field of motion pictures and radio, in foreign affairs, in union affairs, in religion, in science, the Committee has acted with devastating force upon the rights guaranteed by the First Amendment. Truly, "the case is as if the enabling Act read 'the Committee shall expose unorthodox propaganda in order to restrain and punish it' ". Edgerton, *J.*, *Barsky* v. *U. S.*, 167 F. 2d at 259, 260.

The evil has thus grown. The very existence on the books of such a vague and indefinite statute as the statute setting up the House Committee on un-American Activities is certainly today a deterrent on the free practice of the rights granted to citizens under the Constitution. It has been pointed out that the every threat of such a statute being on the books makes it invalid under the First Amendment to our Federal Constitution:

> "The fact that bona fide attempts to comply with an indefinite statute might result in curtailment of socially desirable activities seems sometimes to have influenced the Court to enhance the preciseness of notice required. A statute prohibiting the charging

of 'excessive prices,' for example, may cause the curtailment of desirable business activity because businessmen are not sure just what prices will be held to be within the ban. In the case of a statute which might be interpreted to apply to a civil liberty, *not only is the desirability of civil liberties made clear by the Constitution, but the deterrent effects of such a statute may well impair the very processes by which the law may be altered.* Therefore, if the statute might apply to any hypothetical exercise of the rights of free speech, press, or religion, the Court has indicated that the statute is unconstitutional *even as to an activity which is clearly within its terms and is not constitutionally protected.*" (Note 62 Harvard Law Review 86 (1948).) (Italics added.)

The Resolution is not specific, and for this and all the other reasons set forth heretofore it should therefore also be held unconstitutional under the First Amendment to our Constitution.

C

The Resolution violates the Ninth and Tenth Amendments to the Federal Constitution.

A basic constitutional right is the "exemption of (one's) private affairs, books, and papers from the inspection and scrutiny of others." *In re Pacific Railway Commission,* 32 Fed. 241, 250 (N. D. Cal., 1887) (FIELD, *J.*); *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881); *Jones* v. *Securities & Exchange Commission,* 298 U. S. 1 (1936). The Congressional powers of investigation has, accordingly, been circumscribed by the limits first prescribed in *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881). Like other implied powers, the Congressional power of investigation "is a means to an end and not the end itself"; it "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive

authority expressly conferred." *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); see also *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 173 (1927); *In re Chapman*, 166 U. S. 661, 667 (1897); *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928).

The constitutional functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8). Investigations into elections or corruption of legislators. (*In re Chapman*, 166 U. S. 661 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376 (1928); *Barry* v. *United States*, 279 U. S. 597 (1929)) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929)) were not, in scope and in purpose, investigations into the private affairs of private persons although inquiry into those private affairs may have been incidental thereto. But where the objective of an investigation is future general legislation, then the scope of the investigation may be defined in terms of the private affairs of private citizens.

The case of *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), is the only instance where this Court considered an investigation which has for its defined scope the private affairs of private citizens. It was there held that if the investigation is such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881). Such a void investigation was held to be without the constitutional grant of power to Congress contained

in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the People and to the States by the Ninth and Tenth Amendments.

Kilbourn v. *Thompson* has never been overruled by this Court.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation which is wholly incommensurate with its scope. *Eberling, Congressional Investigations* 383 (1928). The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation.* The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors** is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is and has been the Bill of Rights. The House Committee has repeatedly stated that the objective of the Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation.*** An investigation which, at best, abridges speech in an effort to determine whether and what

* See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.* 153, 216-217 (1926).

** See Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 n. 109 (1947); 94 Cong. Rec. 2495 (1948).

*** See Note, 47 *Columbia Law Rev.* 416, 427 n. 110 (1947).

speech may be abridged is in violation of the Ninth and Tenth Amendments.

. . . . . .

Petitioners in again urging the unconstitutionality of the Resolution do not thereby urge this Court to weaken but to fortify the Congressional investigatory power. In a democracy, public confidence in the integrity and fairness of an institution of Government is essential if that institution is to be vital and effective. "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse. For a widespread belief that the Committee is acting in an Un-American way to even an American end will destroy the Committee's usefulness in the eyes of 'a liberty-loving people'." *

For all these reasons, it is respectfully urged by the petitioners herein that this Court declare the statute establishing the House Committee on Un-American Activities unconstitutional, and that the conviction of the petitioner Eisler should be set aside.

Respectfully submitted,

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* *Josephson* v. *United States*, 165 F. (2) 82, 100 (C. C. A. 2, 1947), *cert. den.* 333 U. S. 838 (1948) (Clark, J., dissenting).